

This is a supplemental private letter ruling issued in response to ST-06-0030-GIL, which discusses the definition of “use” pursuant to The Electricity Excise Tax Law. See 35 ILCS 640/2-3(k). (This is a PLR.)

June 29, 2006

Dear Xxxxx:

This supplemental private letter ruling is in response to your letter dated November 10, 2004, in which you requested information, and upon which general information letter ST-06-0030-GIL was issued. The Department received the supplemental information provided in response to our request for additional information received November 3, 2005 and June 1, 2006. The Department issues two types of letter rulings. Private Letter Rulings (“PLRs”) are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department’s regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter (“GIL”) is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.tax.illinois.gov to review regulations, letter rulings and other types of information relevant to your inquiry.

Review of your request disclosed that all the information described in paragraphs 1 through 8 of Section 1200.110 appears to be contained in your request. This supplemental Private Letter Ruling will bind the Department only with respect to TAXPAYER for the issue or issues presented in this ruling, and is subject to the provisions of subsection (e) of Section 1200.110 governing expiration of Private Letter Rulings. Issuance of this ruling is conditioned upon the understanding that neither TAXPAYER nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request. In your letter you have stated and made inquiry as follows:

On behalf of TAXPAYER, we respectfully request a Private Letter Ruling from the Illinois Department of Revenue (the ‘Department’) pursuant to 2 Ill. Adm. Code 1200.110. As explained in more detail below, Taxpayer requests that the Department issue a private letter ruling that no Electricity Excise Tax (‘EET’) is imposed with respect to electricity purchased by Taxpayer and delivered to a generating or non-generating facility owned by Taxpayer where such electricity is used or consumed by Taxpayer in the generation, production, transmission, distribution, delivery, or sale of electricity in the regular course of its business.

Statement of Facts

Taxpayer is a Limited Liability Company with its principal place of business in Illinois at ADDRESS, Illinois. Taxpayer is engaged in the generation, production, and sale of electricity in the State of Illinois.

Basics of Power Delivery. Generally, an electric power system is composed of three elements: generation, transmission, and distribution. Electricity is produced at a generating station. Substations adjacent to the generating station prepare the power for transmission by increasing, or 'stepping up,' the voltage, generally to between 138 and 765 kilovolts depending on the distance to be traveled and the amount of electricity to be delivered. The electricity is then delivered to the transmission provider and travels from the substation along transmission lines to substations located in the area where the power will be used or, if it is to be sold elsewhere, to interconnections with neighboring systems. Once the electricity reaches the area where it will be used or consumed, the voltage is decreased, or 'stepped down,' at a substation, and carried by the delivering supplier along local distribution lines. Typically, these lines range in voltage from 4,000 to 34,000 volts. Once the power reaches the immediate area or building where it will be delivered to consumers, the voltage is, in most cases, further decreased by distribution transformers to a voltage which can safely be used by consumers (between 120 and 2,400 volts). In some cases, this low-voltage electricity will travel along secondary distribution lines a very short distance until it reaches the end user. Along with these lines and substations, utilities maintain communication and relaying systems to promote the safe and reliable operation of the grid. This network of transmission lines, distribution lines, substations, and associated equipment is referred to as the 'transmission and distribution system' or the 'T&D system.'

Taxpayer owns and manages several generating stations in Illinois at which it produces electricity for sale. In general, Taxpayer sells electricity to, among others, DELIVERY SERVICE COMPANY, which then delivers and resells the electricity to retail consumers in Illinois. DELIVERY SERVICE COMPANY owns and operates the T&D system used to transport electricity to retail customers in its Illinois service territory. Generally, DELIVERY SERVICE COMPANY takes 'title' to electricity when it leaves the generating station.

When a generating station is down and not producing electricity or, in some instances, even when stations are in full operation, Taxpayer may purchase electricity from DELIVERY SERVICE COMPANY for use and consumption at the generating station directly in the production and generation of electricity. In addition, Taxpayer may use electricity purchased from DELIVERY SERVICE COMPANY for the operation of its facilities at sites, other than generating stations, not directly involved in the generation of electricity; as explained more fully below, such electricity is, however, being used by Taxpayer in the production and/or sale of electricity.

Applicable Law

In 1997, the Electric Service Customer Choice and Rate Relief Law of 1997 (the 'Restructuring Legislation'), which included the Electricity Excise Tax Law (the 'Act'), was enacted. Effective August 1, 1998, the Act imposes the EET on 'the privilege of using in this State electricity purchased for use or consumption and not for resale.' 35 ILCS 640/2-4(a). The EET is imposed at graduated rates based on the number of kilowatt-hours delivered to a purchaser and used or consumed each month. See *id.* The term 'purchaser' is defined in the Act as 'any person who acquires electricity for use or consumption and not for resale, for a valuable consideration.' 35 ILCS 640/2-3(e). The

term 'use' is defined in the Act as 'the exercise by any person of any right or power over electricity incident to the ownership of that electricity, except that it does not include the generation, production, transmission, distribution, delivery or sale of electricity in the regular course of business or the use of electricity for such purpose.' 35 ILCS 640/2-3(k).

The EET is required to be collected from a purchaser by 'any delivering supplier maintaining a place of business in this State.' 35 ILCS 640/2-7. 'Delivering supplier' is defined in the Act as 'any person engaged in the business of delivering electricity to persons for use or consumption and not for resale.' 35 ILCS 640/2-3(i). Delivering suppliers are required to collect the EET with respect to electricity delivered 'to or for the purchaser.' 35 ILCS 620/2-7.

Requested Rulings

Taxpayer requests that the Department issue a private letter ruling indicating that no EET is imposed with respect to electricity purchased by Taxpayer and delivered to a generating or non-generating facility owned by Taxpayer where such electricity is used or consumed by Taxpayer in the generation, production, transmission, distribution, delivery, or sale of electricity in the regular course of its business.

Taxpayer does not 'use' electricity within the meaning of the Act, and therefore, the EET cannot be imposed with respect to the electricity at issue. See PLR ST 02-0021 (August 5, 2002) ('use' does not include use at administrative offices, technical or engineering facilities and other locations by a delivering supplier). As discussed above, the EET is imposed on the privilege of 'using' electricity in Illinois. The Act defines 'use' to exclude 'the generation, production, transmission, distribution, delivery or sale of electricity in the regular course of business or the use of electricity for such purposes.' 35 ILCS 640/2-3(k). The electricity at issue in these transactions is 'used' by Taxpayer in the regular course of its business of generating and producing electricity, either to supply power consumed elsewhere on the generating station property, to supply power to a different generating station, or to supply power to a non-generating facility. Thus, this electricity is not 'used' within the meaning of the Act, and no EET should be imposed.

This conclusion is consistent with the holding of the Illinois Appellate Court in *American Stores Company v. Department of Revenue*, 296 Ill. App. 3d 295 (1st Dist. 1998) ('*American Stores*'). At issue in *American Stores* was section 2-201 (g)(3) of the Illinois Income Tax Act ('IITA'), which permitted taxpayers an investment tax credit ('ITC') against income tax for 'investment in qualified property.' *Id.* at 297. 'Qualified property' was defined as 'property which...is used in Illinois by the taxpayer in...retailing.' *Id.* The taxpayer claimed ITCs for investment in buildings, machinery, and other equipment acquired and placed in service in its Illinois retail operations, including store equipment used both on and off the retail selling floor, warehouses and related equipment, transportation facilities and related equipment, and general office equipment. See *d.* at 297.

The Department disallowed the ITCs for all property except that used on the retail selling floor, ruling that the remaining property was not 'used' in 'retailing,' as required by the IITA. See *id.* The Department argued that the term 'property used in retailing' was intended to refer only to property actually used on the retail selling floor and could not be expanded to include *all* property used in support of retailing. See *id.* The taxpayer contended that this term encompassed the 'machinery, equipment, and offices

used to carry out functions such as accounting, purchasing, risk management, marketing strategies, personnel functions, and legal matters,' which the taxpayer assessed were 'essential parts of the retailing business.' *Id.*

The Court employed various principles of statutory construction to ascertain the legislature's intent in enacting the ITC. See *id.* The Court found that neither the plain language of section 2-201(g) nor its legislative history supported the distinction advocated by the Department between equipment located at the retail site and that located elsewhere. See *id.* at 300. Furthermore, the Court found no limiting language within the statute allowing ITCs only for qualified property located at retail sites. See *id.*

Instead, the Court found that the legislature intended a more expansive reading of the term 'retailing,' including not only 'property used in 'the sale of tangible property,' but also property use to perform 'services rendered in conjunction with the sale of tangible consumer goods or commodities.'" *Id.* The court also noted that the legislature's use of such language 'demonstrates. . .[its] intention that qualified property used 'in retailing' includes any property used by a retailer to obtain and complete a retail sale, or to perform services in conjunction with the completion of such a sale.' *Id.*

The plain language of the Act excluding 'the generation, production, transmission, distribution, delivery or sale of electricity in the regular course of business or the use of electricity for such purposes' from the EET's definition of 'use' is entitled to a similarly broad reading. Just as the Illinois Appellate Court found that property used in American's back-office operations was eligible for the ITC, electricity used in any facet of generating, producing, transmitting, distributing, delivering, or selling electricity, whether at a generation station or an administrative office, should be excluded from the definition of 'use' under the Act.

Therefore, Taxpayer requests that the Department issue a private letter ruling to Taxpayer indicating that no EET is imposed with respect to electricity purchased by Taxpayer and delivered to a generating or non-generating facility owned by Taxpayer where such electricity is used or consumed by Taxpayer in the generation, production, transmission, distribution, delivery, or sale of electricity in the regular course of its business.

Procedural Statements

The Illinois Department of Revenue is not currently conducting an audit of Taxpayer or any of its affiliated companies. To the best of Taxpayer's knowledge, the issues presented by this ruling request are not being addressed by pending litigation involving Taxpayer, any of its subsidiaries, or any related taxpayers. Additionally, Taxpayer has not found any Illinois case law or regulations that are dispositive of the requested rulings.

The Department has previously given a favorable ruling on the same or similar issues for NAME. On August 5, 2002 the Department issued Private Letter Ruling ST 02-0021, ruling that: '...the Department agrees that no Electricity Excise Tax is incurred upon electricity used at administrative offices, technical or engineering facilities and other locations outside the transmission and distribution system by a delivering supplier. This is due to the definition of the term 'use' in the Law. 'Use' does not include the exercise of right or power over the electricity for the generation, production, transmission, distribution, delivery or sale of electricity in the regular course of business or the use of

electricity for such purposes. See 35 ILCS 640/2-3.' A copy of PLR ST 02-0021 is attached.

Any further information required by the Department may be obtained by calling PERSON, Taxpayer's Representative.

Attached is a power of attorney authorizing the undersigned counsel to act on behalf of Taxpayer in filing this request for a ruling. The undersigned counsel declares that he is not currently under suspension or disbarment from practice before the Department and is a member in good standing of the bar of the State of Illinois.

Request for Conference

Taxpayer respectfully requests a post-submission conference with a representative of the Department to allow Taxpayer the opportunity to answer any questions the Department may have, and to allow the Department to obtain any additional information it requires regarding the rulings requested by Taxpayer.

Supplemental Information Provided

As you know, TAXPAYER has requested that the Illinois Department of Revenue (the 'Department') issue a private letter ruling that no Electricity Excise Tax ('EET') is imposed with respect to electricity purchased by Taxpayer and delivered to a facility owned by Taxpayer, where such electricity is consumed by Taxpayer in the generation, production, transmission, distribution, delivery or sale of electricity in the regular course of its business.

This letter is to thank you for meeting with us in Springfield on May 3rd discuss the ruling request. We appreciate this opportunity to provide to the Department the additional factual information, regarding Taxpayer's facilities, that we presented at our meeting and confirmation of certain factual statements regarding the facilities. Set forth below, please find a detailed description of each of Taxpayer's facilities in Illinois and the activities conducted there, an additional argument in support of Taxpayer's position and a request to limit certain aspects of Taxpayer's Request for Ruling.

Generating Plants

Taxpayer owns and operates generating stations and one retired generating station that is currently used to support the power grid, as described in more detail below. Taxpayer is the only user of each facility; none of the facilities are subleased to or occupied by any business other than Taxpayer. All electricity used at each of these facilities is used by Taxpayer.

NAME. NAME Generating Station Description.

NAME. NAME Generating Station Description.

NAME. NAME Generating Station Description.

NAME. NAME Generating Station Description.

NAME. NAME Generating Station Description.

NAME. NAME Generating Station Description.

NAME. NAME Generating Station Description.

Generation Support Facilities

Taxpayer also operates five generation support facilities in Illinois, as described in more detail below. Taxpayer is the only user of each facility and none of the facilities are subleased to or occupied by any business other than Taxpayer. All electricity used at each of these facilities is used by Taxpayer. Taxpayer also operates additional generating stations and generation support facilities outside of Illinois.

NAME. ADDRESS, DESCRIPTION LOCATON.

NAME. ADDRESS, DESCRIPTION LOCATON.

NAME. ADDRESS, DESCRIPTION LOCATON.

NAME. ADDRESS, DESCRIPTION LOCATON.

NAME. ADDRESS, DESCRIPTION LOCATON.

Taxpayer's Position

As discussed during our meeting, and in both our initial Request for Ruling dated November 10, 2004 and the Supplemental Information letter dated November 3, 2005, it is Taxpayer's position that the electricity used by Taxpayer at each of the facilities described above is used in the 'generation, production...or sale' of electricity in the regular course of Taxpayer's business. As the Department ruled in PLR ST 02-0021 (August 5, 2002), where a taxpayer is in the business of selling electricity, electricity used in administrative offices, technical and engineering facilities and other locations is being used for the 'sale' of electricity.

As we further discussed during our meeting, the word 'production' as used in the Electricity Excise Tax Act should be interpreted broadly, to include all activities of a taxpayer in the business of generating electricity. In addition to the legal authorities discussed in its prior submissions, Taxpayer believes that this position is supported by the Gas Use Tax Law, enacted in 2003. Section 5-50 of the Gas Use Tax Law provides that the Gas Use Tax does not apply to 'gas used in the *production* of electric energy.' 35 ILCS 173/5-50(e)(emphasis supplied). Thus, as it is for electricity used in the *production* of electricity under the EET, all gas used in the *production* of electric energy is exempt under the Gas Use Tax. However, the next sentence of the Gas Use Tax, Section 5-50(e), goes on to carve out certain uses of gas that would otherwise be exempt as part of the 'production' of electric energy. This second sentence states that 'This exemption does not include gas used in the general maintenance or heating of an electric energy production facility or other structure.' *Id.* Thus, it is clear that the word 'production' as used in this context *includes* 'gas used in the general maintenance or heating of an electric energy production facility,' and would have been exempt but for the inclusion of the second sentence of Section 5-50(e).

A similar conclusion must be drawn from the use of the word 'production' in the Electricity Excise Tax. All electricity used in the 'production' of electricity is exempt, including electricity used in general maintenance and heating of a production facility. Thus, all electricity used by Taxpayer in its generating and non-generating facilities is exempt from EET.

Although we believe that our legal position is quite strong, we appreciate the concerns you expressed during our meeting with respect to issuing a private letter ruling regarding certain uses of electricity by Taxpayer. We have conducted an internal

investigation and determined that it is possible for Taxpayer to separately meter its use of electricity in certain portions of its facilities. Thus, in an effort to be responsive to your concerns, we would separately meter or measure electricity used in certain portions of Taxpayer's facilities for the functions described below. We would, therefore, respectfully request that you remove this use of electricity from your consideration in Taxpayer's private letter ruling, and express no opinion in issuing a ruling as to the taxability of the following:

- **EXERCISE Facilities**. Electricity used by Taxpayer to operate EXERCISE facilities, located in any of its facilities, will be separately metered or measured and will not be considered part of the ruling requested. A 'EXERCISE facility' will be defined as a separate, dedicated room containing only health and exercise equipment.
- **NAME**. Taxpayer does not believe that NAME uses any significant amount of electricity, as the NAME is totally shut down and closed. At most, the exterior of NAME is lit for security purposes and the NAME may contain some monitoring equipment. In addition, preliminary research leads us to believe that the electric power used at the NAME is power that is generated at either NAME2 or NAME 3 and that none of the power used at NAME is purchased at retail for valuable consideration. Nonetheless, Taxpayer will separately meter or measure any electricity purchased for use at NAME, and such electricity used at NAME will not be considered part of the ruling requested.

Please contact me with any questions regarding this information.

DEPARTMENT'S RESPONSE:

With the additional information you have provided to the Department, we are now able to issue a Private Letter Ruling. This ruling is based on the factual representations submitted to this office.

The Electricity Excise Tax Law states that "[u]se" means the exercise by any person of any right or power over electricity incident to the ownership of that electricity, except that it does not include the generation, production, transmission, distribution, delivery or sale of electricity in the regular course of business or the use of electricity for such purposes." See 35 ILCS 640/2-3(k).

The Department has conducted a fact intensive study based on the relevant data provided in this case, and has determined that electricity used in the generation, production, transmission, distribution, delivery or sale of electricity in the regular course of business at the generating plants at NAME, NAME, NAME, NAME 2, and NAME 3, NAME, NAME, and NAME, including the NAME on LOCATION, the NAME and NAME facilities, the NAME on LOCATION, and the NAME, does not fall within the definition of "use" under the Electricity Excise Tax Law, and are therefore exempt from the Electricity Excise Tax.

We believe that the electricity used at the NAME, which has been shut down and is no longer used in any manner, and electricity used at any EXERCISE facilities located in any of the facilities, is not electricity used in the generation, production, transmission, distribution, delivery or sale of electricity. Therefore, the use of such electricity at the NAME and any of the EXERCISE facilities does not fall within the exclusion set out in the definition of "use" provided in subsection (k) of 35 ILCS 640/2-3.

The factual representations upon which this ruling is based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the factual representations recited in this ruling are correct and complete. This Private Letter Ruling is revoked and will cease to bind the Department 10 years after the date of this letter under the provisions of 2 Ill. Adm. Code 1200.110(e) or earlier if there is a pertinent change in statutory law, case law, rules or in the factual representations recited in this ruling.

I hope this information is helpful. If you have further questions concerning this Private Letter ruling, you may contact me at 782-2844. If you have further questions related to the Illinois sales tax laws, please visit our website at www.tax.illinois.gov or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Edwin E. Boggess
Associate Counsel

EEB:msk